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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

LOTTIE MAY MARTIN, JAMES MARTIN, AND THE SMOOT SAND & GRAVEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on October 31, 1949, by the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the District Court (R. 97) is reported under the name of *United States* v. *Groen* at 72 F. Supp. 713. The opinion of the Court of Appeals (R. 736-738) is reported at 177 F. 2d 733.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 739). By order of the Chief Justice, dated January 25, 1950, the time for filing this petition was extended to March 30,

1950 (R. 741). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).[1]

QUESTIONS PRESENTED

Respondents are riparian owners on the Anacostia River, the title to the bed of which was ceded by Maryland to the United States in 1791. The courts below have held that, under Maryland common law existing prior to 1791, respondent's predecessors had riparian rights to make fills in the river and thus acquire from the state title to portions of the bed; that this power continued after cession, even though no Congressional legislation sanctions its exercise; and that, since cession, respondents have acquired the Government's title, by filling, to a substantial part of the former river bed.

The questions presented are:

1. Whether, in these circumstances, the United States can be divested of the title to the beds of navigable streams in the District of Columbia absent express grant or authorization of Congress.

2. Whether, assuming that the courts below were correct in resorting to the Maryland common law of the pre-cession period to determine the nature

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[1] Section 5 of the Act of April 27, 1912, 37 Stat. 93, 94, under which this suit was brought, provided for a direct appeal to this Court from the Supreme Court of the District of Columbia (now the United States District Court for the District of Columbia, Act of June 25, 1936, 49 Stat. 1921, now 28 U.S.C. secs. 88, 132). This section was repealed by Section 13 of the Judiciary Act of 1925, 43 Stat. 936, 941-942. *United States* v. *Belt*, 319 U.S. 521.

and extent of riparian rights in government-owned rivers in the District of Columbia, they have correctly construed the law of Maryland.

3. Whether, in any event, the rights of riparian owners of land on a navigable stream in the District of Columbia are subordinate to the future power of the United States, in its capacity as proprietor and sovereign, to devote land below the natural high-water mark to public purposes (other than improvements in aid of navigation).

4. Whether whatever riparian rights are accorded respondents should also be accorded the United States as owner of fee title to land in a street terminating at the river.

STATEMENT

On April 27, 1912, the Congress enacted a statute "providing for the protection of the interests of the United States in lands and waters comprising any part of the Potomac River, the Anacostia River or Eastern Branch, and Rock Creek and lands adjacent thereto." 37 Stat. 93. This Act requires the Attorney General to institute suits to establish and make clear the title of the United States "in and to any part or parcel of the land or water in the District of Columbia in, under, and adjacent to the Potomac River, the Anacostia River or Eastern Branch, and Rock Creek, including the shores and submerged or partly submerged land, as well as the beds of said waterways, and also the upland immediately adjacent thereto, including

made lands, flats, and marsh lands;" such suits were to be in the nature of bills in equity and were to be brought against any persons or corporations who might have, or pretend to have, any right, title, claim, or interest adverse to the complete title of the United States. The Act further requires the defendants to set forth their claims and that the court make a final determination of every question of right, title, interest, or claim in the premises. Section 4 provides that if on the final hearing the court is of opinion that there exists any right, title, or interest adverse to the United States, then it shall forthwith and in a summary way proceed to ascertain the value thereof and report its conclusion to the Congress.

The present suit was instituted under the foregoing Act on January 30, 1913, to establish the title of the United States to certain land adjacent to and under the Anacostia River or Eastern Branch of the Potomac River (R. 2-3).[2] The land described ("Square East of 664") is located at the foot of South Capitol Street and is bounded on the west by Water Street, on the north by S Street, on the south by T Street, and on the east by the line of maximum depth of the Eastern Branch (R. 3).

In 1791, the States of Maryland and Virginia ceded to the United States an area ten miles square

[2] The names Anacostia River and Eastern Branch are synonymous and are used interchangeably throughout the suit and this petition.

for the establishment of a permanent seat for the Federal Government.[3] Included within the area ceded by the State of Maryland was that part of the Eastern Branch which is here involved. About the same time and in the course of the negotiations by the President of the United States and the Commissioners appointed to act under his supervision to locate the district for the seat of the Government, the owners of lots in the Town of Carrollsburg (which was located on the Eastern Branch in this vicinity) entered into an agreement with the President, whereby it was agreed that they would convey their lots and lands to be laid out at the pleasure of the President as part of the federal city and that they would receive one-half of the quantity of their respective lots "as near their present situation as may agree with the new plan" or failing this, have satisfaction in money (R. 315-316). Pursuant to this agreement, the proprietors in Carrollsburg conveyed their lots in trust to be laid out for the city (R. 66, par. 9(b); Pl. Exs. T-22 to T-27, R. 461-485) and were in turn allotted and assigned certain lots in the new city. Lots 1, 2, 3, 6, 7 and 8 in Square East of 664 were allotted to respondents' predecessors in title on June 26, 1794 (R. 181-183). Lots 4 and 5 were sold by the Commissioners to provide funds for public buildings and other purposes in connection with the

[3] The historical background and the details of the founding of the city of Washington are set out in *Morris* v. *United States*, 174 U.S. 196, a similar suit involving lands in and along the Potomac River. See also R. 100-105.

laying out of the city and were subsequently conveyed to respondents' predecessors in title (R. 73, par. 18(a); Findings Nos. 4-5, R. 115). These lots in original Square East of 664 have been extended into the Anacostia River by artificial fill,[4] and a wharf has been constructed which projects into the river along the south line of S Street (R. 91-92; Finding No. 8, R. 116).

In 1794 (the date of the allotment of lands to respondents' predecessors), the high-water line was an irregular line running a distance of 61 to 81 feet east of the easterly line of Water Street (Finding No. 6, R. 115; Pl. Ex. 7). As a result of filling, the present high-water line (with the exception of a small area not filled at the time of the trial) runs along the bulkhead line, a distance of 366 feet east of the easterly line of Water Street at the north of the square and 323 feet at the south of the square (Finding No. 8, R. 116; Pl. Ex. A).[5]

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[4] The statement in the opinion of the court below (R. 737) that the land in Square East of 664 has been extended eastward into the river, "partly by natural accretion but largely by artificial fill," is apparently inadvertent since it was stipulated that none of the land between the high-water line of 1794 and the present high-water line was the result of natural accretion (R. 91-92), and the trial court found that the extension of the lots was by artificial accretion or fill (R. 116).

[5] It may be noted that while the term "high-water line of 1794" is synonymous with the "natural" high-water line, the date 1794 does not indicate the time when the natural high-water line was changed by artificial means. Since it was stipulated that the area between the high-water line of 1794 and the present high-water line is artificial fill (R. 91-92), no effort was made at the trial to establish the date when the filling occurred. However, the defendant Martin testified

The United States alleged in its complaint that it had title to all of the land described therein (R. 4-6). It was to have been contended that the United States had title to the original fast land described (as well as the filled land and land under water) because it lay between Water Street and the river and, as this Court held in *Morris* v. *United States,* 174 U.S. 196, it was intended under the original plans that the city of Washington be bounded by a waterfront street (Water Street) and that there should be no private ownership of land between that street and the river. However, for reasons not appearing of record, the trial of the case was delayed many years and in the meantime the court below held in another case (*United States* v. *Belt,* 142 F. 2d 761) that the plan of the founders of the city for a water street bounding the city had been abandoned as to lands along the Anacostia River. Accordingly, it was there held that the predecessors of persons claiming title to a square adjacent to that involved here had acquired title to the original fast land riverward of Water Street to the high-water line of the Anacostia River, together with riparian rights.

As a result of the decision in the *Belt* case, the Government conceded, in the present case, that respondents' predecessors acquired title to the

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that he filled lots 6, 7 and 8 out to the bulkhead line in 1906 (R. 232). A comparison of a map of the area dated October 27, 1926 (Pl. Ex. T-21) and a map showing conditions at the time of the trial (Pl. Ex. A) shows that approximately half of the filled area has been made since 1926.

original fast land riverward of Water Street to the high-water line of the Anacostia River as of 1794, together with riparian rights (R. 52-53, 80). However, it was contended that the United States was and still is vested with title to all land below the high-water line of 1794 (R. 53, 69, par. 13(10)(a); R. 737).

The trial court held that by virtue of the cession to the United States in 1791 by the State of Maryland of that part of the District of Columbia which formerly lay in that state, the United States became vested with fee title to the soil below high-water mark on the Eastern Branch, rejecting a claim by respondents to fee title to the bed of the stream (R. 105-107). However, the trial court further held that respondents and their predecessors in title, being riparian owners, were entitled to whatever rights and privileges appertain to riparian property; that such rights include the right to fill and wharf out below ordinary high-water mark; that the establishment of harbor lines along the Eastern Branch by the Secretary of War (acting under the River and Harbor Act of March 3, 1899, sec. 11, 30 Stat. 1151, 33 U.S.C. 404) operated as a license or permit to fill to the bulkhead line and to build a pier to the pierhead line; and that defendants acquired title to land reclaimed by filling below high-water mark (R. 107-113). Accordingly, it entered findings of fact and conclusions of law in which it found that riparian rights, including the right to make fills

and build wharves, were appurtenant to respondents' lots and concluded that by exercising those rights respondents "acquired ownership and title to the reclaimed land landward of the bulkhead line," and that the United States "has no right, title or interest in any of the lands included in Square East of Six Hundred and Sixty-Four (E. of 664) nor in the wharf projecting from that square" (R. 117). Judgment was entered accordingly (R. 117-120, 122-125).

Upon appeal by the United States and cross-appeal by respondents, the Court of Appeals affirmed the judgment of the trial court insofar as it determined that by exercise of their riparian rights respondents had acquired title to the land filled in below the natural high-water mark of the river and the wharf extending out therefrom, and that the United States had no right, title, or interest in such lands or wharf; but the Court of Appeals directed that the judgment be modified so as to preserve the power of the United States to take the fill and wharf without compensation in the interest of navigation. The court below also affirmed the trial court's finding that the respondents owned no part of the present bed of the Anacostia River (R. 738).[6]

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[6] Section 4 of the Act of April 27, 1912, 37 Stat. 93, 94, provided that if, on final hearing of suits brought under that Act to establish the title of the United States, the court was of opinion that there existed any right, title, interest, or claim adverse to the United States, it should proceed to ascertain the value of such right, title, interest, or claim and make a

REASONS FOR GRANTING THE WRIT

The lower courts have properly held that the United States has had title to the bed of the Anacostia River since 1791, and that neither respondents nor their predecessors have ever owned any part of that bed; but, at the same time, these courts have ruled that respondents and their predecessors, as riparian owners, have had the right, without legislative sanction, to make fills and build wharves and by the exercise of those rights acquire title from the United States to land in the river beds. This holding sharply departs from the fundamental principle that title to United States property can be divested only by express Congressional authority, threatens the interest and title of the United States in under-water lands owned by it, and misconstrues an important branch of District of Columbia real property law which is of concern both to the Government and to property owners.

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report thereof to the Congress. In the present case, the trial court entered an order determining title on October 27, 1947, and setting the cause for hearing on the question of the value of respondents' property (R. 117-120). After a hearing, the trial court on January 8, 1948, entered a "final judgment" as to title and fixing the value of the property at $156,087.50 (R. 122-125). The United States appealed from both the order of October 27, 1947, and the judgment of January 8, 1948. Respondents appealed from the judgment of January 8, 1948, claiming a greater title than that awarded to them by the trial court and also claiming errors in the valuation proceedings. No question is presented by the United States with regard to the valuation proceedings except that in the event it is ultimately determined that respondents' title differs from that found to exist by the trial court, the judgment fixing the value of the property would, of course, have to be reversed to permit the trial court to determine the value of the title, if any, actually outstanding.

1. a. Although correctly holding that by the Act of December 19, 1791 (Md. Laws 1791, c. 45, D. C. Code (1940), p. xxviii)—which ratified the cession of that part of the District of Columbia which formerly lay in Maryland—the State ceded the bed of the Anacostia River to the United States, the courts below have established the continuing right of riparian owners to acquire the title of the United States to that bed by wharfing and filling.[7] Despite the established principle that the sovereign can be divested of its title to lands under navigable waters only upon express terms and that, under the Constitution, property belonging to the United States can be disposed of only upon specific authority of Congress (*Morris* v. *United States,* 174 U. S. 196, 232-237; *Shively* v. *Bowlby,* 152 U. S. 1, 13, 48, 58; *Mar-*

[7] Following the same chain of title, this Court has on more than one occasion held that the United States became vested with title to the lands underlying the Potomac River by the cession from Maryland. *Morris* v. *United States,* 174 U.S. 196, 226-230, 246; *Marine Ry. Co.* v. *United States,* 257 U.S. 47, 63; *United States* v. *Dern,* 289 U.S. 352, 354.

The trial court here likewise held that title to the soil below high-water mark in the Anacostia River vested in the United States by the cession (R. 105-107). Accordingly, its judgment awarded title to the United States to that part of the bed of the river which lies below the present high-water mark "subject to the riparian rights of defendants" (R. 125). This part of the judgment was affirmed by the Court of Appeals, with a statement (R. 737, fn. 1) that it was not to be interpreted as limited by the trial court's conclusion III that "the United States * * * has no right, title or interest in any of the lands in Square East of [664] nor in the wharf projecting from that square." However, the judgment awards title to the filled-in land to respondents, thus decreeing that the title of the United States to that portion of the river bed (which title the Government acquired on cession) has been divested by virtue of the exercise of the alleged riparian rights.

tin v. *Waddell,* 16 Pet. 367, 411; *Sioux Tribe* v. *United States,* 316 U. S. 317, 326; *United States* v. *San Francisco,* 310 U. S. 16, 29-30; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404-405; Const. Art. 4, sec. 3, cl. 2; see also Const. Art 1, sec. 8; cf. *Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, 257), the opinions below (R. 107-111; 737-8) do not rely upon any express grant of rights in, or title to, the river bed, nor upon any statute conferring title to land in the river bed upon riparian owners—and it is clear that no such grant or legislation exists. Cf. *Morris* v. *United States,* 174 U. S. 196, 282, 284-286. On the contrary, Congress has acted more than once to protect the Government's title to the bed of the Potomac and Anacostia Rivers, and has even repealed legislation that would have resulted in a grant of a portion of the bed of the Anacostia. Act of April 27, 1912, 37 Stat. 93; S. Doc. No. 19, 62d Cong., 1st sess., pp. 25, 33-38; S. Doc. No. 462, 61st Cong., 2d Sess.; Act of August 23, 1912, 37 Stat. 358; cf. *Morris* v. *United States,* 174 U. S. 196, 241-243.[8] It is equally plain,

[8] The trial court referred to the establishment of harbor lines by the Secretary of War under the River and Harbor Act of March 3, 1899, sec. 11, 30 Stat. 1151, 33 U.S.C. 404, as operating "as a license or invitation" to fill or wharf out to those lines (R. 110-111). The River and Harbor Act is merely an exercise of the general power of Congress over navigable waters. In the District of Columbia, the United States not only has its usual power to control navigation, but also has proprietary powers over the lands lying under water. *United States* v. *Dern,* 289 U.S. 352, 354. Clearly, authority given the Secretary of War to control navigation cannot, and does not, authorize the granting of proprietary rights in lands under water.

and the lower courts do not deny, that Congress never adopted or confirmed any prior Maryland law giving riparian owners a right to wharf and fill into a navigable stream and thereby acquire title, and that nothing in the Maryland or Congressional legislation at the time of cession effected such an adoption. See *Morris* v. *United States,* 174 U. S. 196, 282, 240-241; *Shoemaker* v. *United States,* 147 U. S. 282, fn. 1, pp. 307-314, at pp. 313-314 (see fn. 10, *infra,* p. 16).

b. The sole support of the court below for the judgment divesting the United States of its title to part of the Anacostia's bed, in derogation of the long accepted rule, is its own *obiter dictum* in *United States* v. *Belt,* 142 F. 2d 761, 767 (R. 738). That *dictum* rested, in turn, only on a *dictum* in *Baltimore & O. R. R. Co.* v. *Chase,* 43 Md. 23, 35, that under the Maryland common law a riparian owner "has the right of access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature may think proper to prescribe for the protection of the rights of the public * * *."

We show below that this statement does not properly reflect Maryland common law (*infra,* pp.16-18). But, even on its face, the *Chase* case does not purport to state that title to the bed of the navigable stream passes from the state to the riparian

owner upon exercise of the described riparian rights. There is a fundamental difference between a riparian right of access to navigable waters and a right to acquire title to the bed of the river by exercising that right. Cf. *United States* v. *Turner,* 175 F. 2d 644, 647 (C. A. 5), certiorari denied, 338 U. S. 851; *City of Mobile* v. *Sullivan Timber Co.,* 129 Fed. 298 (C. A. 5); see also *Shively* v. *Bowlby,* 152 U. S. 1, 14. And whatever riparian power or privilege of filling or wharfing might have existed under Maryland law, before the cession to the United States, it was not—prior to the filling or wharfing—a right of property in the river bed to which the state held title. The Court of Appeals has itself recognized, in another case involving land on the Potomac River, that a riparian right to occupy land below high-water mark with wharves or other improvements rises to the dignity of a vested property right in the stream only when the title of the riparian owner extends to the bed of the stream. *United States* v. *Hurley,* 63 F. 2d 137, 139 (C. A. D. C.), affirmed on other grounds *sub nom. United States* v. *Dern,* 289 U. S. 352. As the *Chase* dictum itself confirms (43 Md. at pp. 35-36), riparian rights of the type claimed here were always subject to change or abolition by the state legislature. See also *Cahill* v. *Baltimore,* 173 Md. 450, 457; *Classen* v. *Chesapeake Guano Co.,* 81 Md. 258; *Giraud's Lessee* v. *Hughes,* 1 Gill & Johns. 249, 265; cf. *Barney* v. *Keokuk,* 94 U. S. 324, 338.

In the light of the strict necessity for express Congressional sanction of any disposition of Government-owned land, we believe that a riparian privilege of this inchoate character, and with these fundamental limitations, cannot be said to have survived the cession. After 1791, federal land law alone controlled the acquisition of interests in the bed of the Anacostia, and governed the exercise of riparian rights. Whatever power the owner may have had to obtain title to the bed by filling, had Maryland retained title to the river, the acquisition of ownership by the United States cut off that potentiality and substituted Congressional grant as the only future means for acquiring title.[9] The United States was now the owner of the river bed, and "the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired." *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404. When the Anacostia bed became a part of the federal domain, this basic rule of federal land law—requiring af-

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[9] We do not read the *Chase* case (or the opinions of the courts below in the present suit) as suggesting that these alleged riparian rights would be "vested" in 1791, prior to actual filling or wharfing by respondents or their predecessors, but in any event this Court is free to decide for itself whether such inchoate rights were so fixed, at that time, that the established rules of federal land law could not thereafter be validly applied. Cf. *United States* v. *Waddill Co.,* 323 U.S. 353, 356-357.

firmative legislative permission for acquisition of rights in United States lands—necessarily took the place of the claimed Maryland rule that the right to obtain ownership by filling could continue to be exercised until the state legislature acted to abolish the right. See *supra,* p. 14; *infra,* pp. 18-19. To hold otherwise, as the lower courts have done, is *pro tanto* to disregard the Constitutional power and rights of Congress, and to permit Maryland land rules to govern the disposition of, and to create interests in, wholly federal property.[10]

2. Furthermore, it is submitted that the courts below erred in interpretation of the law of Maryland as to the rights of riparian owners on navigable streams. It is settled by a long line of decisions in that state that no right in a riparian owner to wharf or fill below the high-water mark is recognized in the absence of legislation specifically authorizing it.[11] The statement in *Balti-*

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[10] This Court has already held that, after Maryland's cession of the lands included in the District, the Maryland land laws were not continued in effect so as to permit the patenting of land in the bed of the Potomac River. *Morris* v. *United States,* 174 U.S. 196, 240-243; see also *Shoemaker* v. *United States,* 147 U.S. 282, fn. 1, pp. 307-314, at pp. 313-314.

[11] See *Casey's Lessee* v. *Inloes,* 1 Gill 430, 497-501, 511-512 (Md. 1844); *Wilson* v. *Inloes,* 6 Gill 121, 169 (Md. 1847); *Giraud's Lessee* v. *Hughes,* 1 Gill & Johns. 249, 265 (Md. 1829); *Baltimore* v. *McKim,* 3 Bland. 453, 466 (Md. 1831); *Wilson's Lessee* v. *Inloes,* 11 Gill & Johns. 351 (Md. 1840); *Hammond's Lessee* v. *Inloes,* 4 Md. 138 (1853); *Day* v. *Day,* 22 Md. 530, 537 (1865); *Goodsell* v. *Lawson,* 42 Md. 348, 362-363 (1875); *Horner* v. *Pleasants,* 66 Md. 475, 477, 7 Atl. 691 (1887); *Sollers* v. *Sollers,* 77 Md. 148, 151-152, 26 Atl. 188 (1893); *Tome Institute* v. *Crothers,* 87 Md. 569, 584, 40 Atl. 261 (1898); *Cahill* v. *Baltimore,* 173 Md. 450, 455,

more & Ohio R. Co. v. *Chase,* 43 Md. 23, 35, that, as a principle of common law, a riparian owner on a navigable stream has "the right to make a landing, wharf or pier," is not only *dictum,*[12] but it stands alone and is contrary to a long line of Maryland cases decided both before and since. Indeed, one of the cases relied upon by the petitioners in *United States* v. *Dern,* 289 U. S. 352, 355, as establishing a common-law right to build and maintain a wharf or other structure below high-water mark on the Potomac River, was *Baltimore & Ohio R. Co.* v. *Chase, supra.* While holding against the petitioners in that case for other reasons, and neither discussing nor deciding the point, this Court expressed doubt (p. 357) that such a right existed "in the absence of a legislative grant either by Maryland before the cession or by the United

196 Atl. 305 (1938). The foregoing cases all arose under specific statutes granting the right to fill or wharf to riparian owners and all recognize that, but for the statute, there would be no right to fill or wharf. From early times, Maryland has conferred certain rights on riparian owners. But in each instance it has been by special acts of the legislature specifically granting defined rights under specific limitations at specified localities.

[12] The question of riparian rights dealt with in that case arose in the City of Baltimore where such rights have been governed by specific statutes since 1745. The decision turned entirely upon the Maryland Act of 1745, c. 9, sec. 10. Moreover, the statement there with reference to the common-law rule was not based on the precedent of Maryland decisions, but primarily on certain decisions of this Court, which were analyzed at length in *Shively* v. *Bowlby,* 152 U.S. 1, 36-40, where it was pointed out that, despite a contrary contention, those cases laid down no general common-law rule as to riparian rights on a navigable stream independent of the law of the particular state involved.

States after it," referring to several of the Maryland cases cited *supra,* pp. 16-17, fn. 11. The trial court in the *Dern* case had held that, under the law of Maryland as it existed in 1801, riparian owners on navigable streams had no vested right to erect a wharf, distinguishing the *Chase* case (*United States ex rel. Greathouse* v. *Hurley,* 60 W. L. R. 162), and the Court of Appeals for the District of Columbia had affirmed its holding (63 F. 2d 137). This decision was not referred to in either the *Belt* opinion or in the instant case.

3. The decision of the court below does not limit respondents' rights to land filled or improvements made prior to judgment (approximately half of which was made since 1926, long after this suit was filed; see fn. 5, *supra*), but apparently confers upon them, and upon other riparian owners of land, the right to acquire title in the future by making improvements below high-water mark. Although the judgment of the district court, affirmed by the Court of Appeals, determined title to land under water between the present high-water mark and the line of maximum depth of the river to be in the United States, it was held to be "subject to the riparian rights of defendants" (R. 125; 737). And there is no limitation or reservation of power in Congress to change the nature of riparian rights, not already exercised by wharfing or filling, without compensation. But, as this Court indicated in *United States* v. *Dern,* 289 U. S.

352, 358, whatever the nature of the riparian rights, they would in any case be subordinate to the power of the United States, in its capacity as proprietor and sovereign, to devote the river bed to a public purpose. Even *Baltimore & Ohio R. R. Co.* v. *Chase,* 43 Md. 23, relied upon by the court below, recognized the power of the state to change or modify riparian rights. See also *Cahill* v. *Baltimore,* 173 Md. 450, 457; *Classen* v. *Chesapeake Guano Co.,* 81 Md. 258; *Giraud's Lessee* v. *Hughes,* 1 Gill & Johns. 249, 265; cf. *Barney* v. *Keokuk,* 94 U. S. 324, 338. See *supra,* p. 14. Specific recognition of this Congressional power should have been included in the judgment.

4. Moreover, if it should be thought that the court below was correct in its ruling as to the nature and extent of respondents' riparian rights, the rights accorded respondents as riparian owners should also be accorded the United States as fee owner of the land in South Capitol Street. *Potomac Steamboat Co.* v. *Upper Pot. S. Co.,* 109 U. S. 672, 680-682, 684; *New Orleans* v. *United States,* 10 Pet. 662, 717; *Richardson* v. *Boston,* 19 How. 263, 269. Since, in our view, the decision below is based upon a nonexistent rule regarding riparian rights in Maryland, there is some difficulty in ascertaining what the ruling in that state would be in the present situation where, because of the curvature of the river bank, the exercise of riparian rights by one owner for the full width of his prop-

erty between parallel lines would interfere with a similar exercise of riparian rights by another owner. The Court of Appeals agreed with the conclusion of the district court that the United States had no such rights with respect to South Capitol Street because "Such rights would cut across and destroy the riparian rights of the appellees" (R. 738). Whatever the rule to be applied in reconciling riparian rights of conflicting owners upon a curve of the river, certainly the award of rights to one owner to the exclusion of all others is not warranted. Cf. *Johnston* v. *Jones,* 1 Black 209, 222-223; *Stull* v. *United States,* 61 F. 2d 826, 829 (C. A. 8); *Cramer* v. *Perine,* 251 N. Y. 177, 184-189.[13]

5. The question whether the United States may be deprived of title to property owned by it, absent express authority of Congress, is one of great importance. The decision of the court below is, as we have shown, in conflict with principles long established by this Court, and it bears directly upon the relation of private riparian ownership to all federal lands underlying bodies of water, wherever located. Riparian rights of the type claimed here should be governed by federal law; the courts below have improperly applied state rules.

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[13] The district court possibly expressed an alternative ground based upon the intention of the founders of the city that South Capitol Street terminate at the north line of S Street (R. 116). The United States challenged this finding upon appeal and the Court of Appeals did not pass upon this question. We do not believe that the evidence warrants a conclusion that South Capitol Street could be cut off from the river by the exercise of riparian rights.

Moreover, the more local question whether, as the court below has here held, owners of land riparian to the Anacostia or Potomac Rivers may acquire title to land in the bed of those streams by wharfing and filling-out should be definitively determined by this Court. In fact, the Congress in enacting special legislation authorizing the institution of suits like the instant case deemed the question of the Government's title to lands under and adjacent to the rivers of the District of Columbia to be sufficiently important to make review by this Court a matter of right upon direct appeal from the trial court. See Act of April 27, 1912, sec. 5, 37 Stat. 93, 94. The repeal of this provision for direct review by the blanket repeal in the Judiciary Act of 1925 of all acts "inconsistent therewith" (*United States* v. *Belt,* 319 U. S. 521) does not controvert the importance attached by Congress to the questions here involved. The asserted right to acquire title to the river bed by future filling in of lands under water would apparently apply not only to the Anacostia River but also to all of the waterfront of the Potomac River, except in so far as it is ruled by *Morris* v. *United States,* 174 U. S. 196, and will probably have a substantial bearing upon further waterfront development and other improvements in the District of Columbia, such as bridges and tunnels.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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